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IN THE

Supreme Court of the United States

October Term, 1957

No. 481

ROCKWELL KENT
and
WALTER BRIEHL,
Petitioners,

v.

JOHN FOSTER DULLES,
Secretary of State.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Rockwell Kent and Walter Briehl respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia, entered in the above entitled cases on June 27, 1957, affirming summary judgments against petitioners entered in the United States District Court for the District of Columbia in suits brought to enjoin the Secretary of State from denying passports to petitioners.

The cases were argued together in the court below. The opinion in the *Kent* case incorporates by reference that in the *Briehl* case. Since the cases involve identical questions, a single petition is filed under this Court's Rule 23(5).

Opinions Below

The opinions in the Court below have not yet been reported. They are separately presented pursuant to this Court's Rule 23(1)(i). The opinions of the District Court were not reported; they are printed at B.R. 71-72 and K.R. 84.[1]

Jurisdiction

The judgments of the Court of Appeals were entered on June 27, 1957 (Appendix B, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the Secretary of State is authorized by law to condition the issuance of passports to American citizens on their meeting political standards devised by him.

2. Whether the Secretary's passport regulations (22 C. F. R. §§ 51.135-51.170, hereinafter referred to as "the Passport Regulations"), are invalid because they are not authorized by Congress and because they conflict with controlling statutes, *viz.*, the Act of June 14, 1902, c. 1088, § 2, 32 Stat. 386, 22 U. S. C. 212; section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U. S. C. 785; and the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999.

3. Whether the Passport Regulations, on their face and as applied to petitioners, abridge First Amendment rights of speech, belief and association; constitute a bill of attainder and an *ex post facto* law, in violation of Article I,

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[1] The Record in Dr. Briehl's case is referred to as "B.R. . .."; that in Mr. Kent's case as "K.R. . . .". References herein to the "Opinion" are to the opinions in the Court below in the former case.

section 9 of the Constitution; and deprive petitioners of their rights of travel and to due process under the Fifth Amendment.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are Article I, Sections 8(3) and 9(3); Article IV, Section 2(1); and the First, Fifth and Ninth Amendments to the Constitution. The statutes involved are the Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U. S. C. 211(a); the Act of June 14, 1902, c. 1088, § 2, 32 Stat. 386, 22 U. S. C. 212; the Internal Security Act of 1950, § 6, 64 Stat. 993, 50 U. S. C. 785; the Immigration and Nationality Act of 1952, § 215(a), 66 Stat. 190, 8 U. S. C. 1185; and the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999. These statutes and the pertinent provisions of the Passport Regulations are reproduced in Appendix A, *infra*.

Statement of the Case

1. The Proceedings in the State Department

These cases arise as a result of passport applications rejected by the Secretary of State under his Passport Regulations of August 28th, 1952. Those regulations provide, in part, that no passport shall be issued to persons (a) "who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion * * * that they continue to act in furtherance of the interests and under the discipline of the Communist Party"; (b) who engage in activities which support the Communist movement * * * as a result of direction, domination or control exercised over them by the Com-

munist movement"; or (c) who, knowingly and wilfully, "are going abroad to engage in activities which will advance the Communist movement" (§ 51.135). The regulations further provide that any passport applicant "may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party" (§ 51.142). At the present time, with the exception of travel to certain countries in the Western Hemisphere, a citizen cannot lawfully depart from or enter the United States without a passport (8 U. S. C. 1185; Proc. No. 3004, 67 Stat. c. 31).

a. *Dr. Walter Briehl*

Dr. Walter Briehl, a psychiatrist whose professional work requires his attendance at international conventions on mental health, obtained and used a passport in 1953 for that purpose (B.R. 23). In 1955, he applied for its renewal to enable him to attend similar medical conventions in Geneva and Istanbul (B.R. 3). The Director of the Passport Office disapproved his request "tentatively", under § 51.135 of the Passport Regulations, on the following grounds:

> "* * * it is alleged that you were a member of the Los Angeles County Communist Party; that you were a member of the Bookshop Association, St. Louis, Missouri; that you held Communist Party meetings; that in 1936 and 1941 you contributed articles to the Communist Publication 'Social Work Today'; that in 1939, 1940 and 1941 you were a sponsor to raise funds for veterans of the Abraham Lincoln Brigade in calling on the President of the United States by a petition to defend the rights of the Communist Party and its members; that you contributed to the Civil Rights Congress bail fund to be used in raising bail on behalf of convicted Communist leaders in New York City; that you were a member of the Hollywood Arts, Sciences and Pro-

fessions Council and a contact of the Los Angeles Committee for Protection of Foreign Born and a contact of the 'Freedom Stage, Incorporated'" (B.R. 13-14, 22-24).

Dr. Briehl was told by the Passport Office that he would have to execute a sworn statement as to "whether you are now or ever have been a Communist" and "explain" his connections with the organizations referred to and "any other Communist front organizations with which you may have been associated" (B.R. 19-20). He appeared with counsel at an informal "hearing" in the Passport Office (B.R. 29-52). Neither his statement of the professional purposes of his travel nor his citizenship was questioned by the Passport Office. Nor did that Office comply with his request that evidence against him, if such there were, be presented.

Dr. Briehl refused to submit to an examination with respect to his political associations on the grounds of relevance and constitutional right (B.R. 46-47). The Secretary of State thereupon declined to issue a passport (B.R. 60-64).

b. *Mr. Rockwell Kent*

Mr. Rockwell Kent, an artist 75 years of age, had for some years used passports for travel abroad. In June, 1955, he applied for a passport. That application was tentatively denied by the Director of the Passport Office on the ground that:

> "* * * it has been alleged that you were a Communist.
>
> "The Department has concluded that your case also falls within the scope of sub-sections (b) and (c) of Section 51.135 of the Regulations. It is the opinion of the Department that the evidence indicates on your part a consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line for an extended period of time" (K.R. 22-23).

The Director's letter of tentative denial relied on articles and speeches by Mr. Kent and on his connections with some organizations on the Attorney General's list; it charged that he had petitioned the Attorney General "criticizing the use of paid informers", had "sought the repeal of the Walter-McCarran Law" and had "urged release on bail of Steve Nelson who was convicted of sedition in Pennsylvania" (K.R. 25).[2] Mr. Kent was told to submit an affidavit stating "whether you are now or ever have been a member of the Communist Party, and it should include a complete explanation of your alleged Communist activities as set forth in a previous letter from the Department to you" (K.R. 31).

On August 2, 1955, Mr. Kent applied again for a passport. He stated under oath that the sole purpose of his proposed travel was "prosecution of profession and pleasure" (K.R. 39). At the informal "hearing" in the Passport Office he was the only witness who appeared. The Passport Office representatives offered into evidence his recent autobiography, *It's Me O Lord*, for the purpose of showing that Mr. Kent had joined many organizations on the Attorney General's list; and they introduced evidence that he had asserted his constitutional privilege before the McCarthy Committee (K.R. 56).

Mr. Kent declined to submit a statement under oath "as to membership in the Communist Party or membership in the Communist-front organizations" (K.R. 59). When asked to submit evidence of conduct "antagonistic to the Communist Party, that showed that he did something not along the line" (K.R. 62-63), Mr. Kent responded:

> "I think that I could very easily think of a number of things that I have done and principles I have ad-

[2] The letter also charged that Mr. Kent had visited Czechoslovakia, Finland and Russia in 1950, when his passport was not valid for travel to these countries. However, the Secretary has elsewhere conceded that such passport limitations do not affect the legality of such travel (Dept. State Press Release No. 241, May 1, 1952).

> vocated that they wouldn't like one single bit. I would have to think about them. Because I have not been concerned * * * whether * * * what I believe in is believed by others, by the Communists or what. But, I'm not going to say that because, as I said before, I consider this irrelevant" (K.R. 62).

The Passport Office declined to give him a passport on the basis of the allegations against him, stating:

> "At the informal hearing, at which you were represented by counsel, you declined to furnish a statement, subscribed and sworn to under oath or affirmation with respect to your present or past membership in the Communist Party, insisting that such a statement was irrelevant. Moreover, you refused to discuss or furnish any information concerning your alleged affiliation with Communist-front organizations or other alleged Communist activities on the same ground. These allegations, which you have neither refuted nor explained, were detailed in my letter to you of June 29, 1955" (K.R. 73).

2. The Proceedings in the Courts below

Petitioners instituted separate lawsuits in the district court for decrees (1) adjudging that they are entitled to passports and (2) directing that the passport in Dr. Briehl's case be renewed and one in Mr. Kent's case be issued. Jurisdiction was invoked under the Administrative Procedure Act, 5 U. S. C. 1009; the Declaratory Judgment Act, 28 U. S. C. 2201 and D. C. Code §§ 11-305, 11-306. Petitioners moved for preliminary injunctions and for summary judgments upon their complaints and supporting affidavits; and the Secretary of State moved for judgments on the pleadings, or alternatively, for summary judgments upon supporting affidavits.

The District Court granted the Secretary's motions for summary judgment and dismissed the complaints, basing its decisions on petitioners' refusal to execute the affidavits required by the Department (B.R. 71-72; K.R. 84-85).

The Court of Appeals, after hearing the cases *en banc*, following earlier oral argument before a division of the Court, affirmed the judgments of the District Court. There was no opinion of the court as such; the eight Judges rendered five separate opinions in the *Briehl* case and reaffirmed their views in the *Kent* case. Those opinions were as follows:

(1) Judge Prettyman, whose opinion was concurred in by Judges Miller, Danaher and Bastian, was of the view that there is a constitutional right to travel under the Fifth Amendment and that "the restrictions imposed by these [passport] regulations and the underlying statutes upon the right to travel are impingements upon that phase of liberty and indirectly upon the exercise of First Amendment rights" (Opinion, p. 22). Balancing "private right against public requirement" (*ibid.*), however, he concluded that "[in] the international situation of the present, the reasonable requirements of national security and interest and the delicate characteristics of foreign relations outweigh the needs or desires of an individual to travel" (*ibid.*). It was his opinion that the Passport Regulations are authorized by the foreign affairs' power of the President and by the statutes which authorize the Secretary to issue passports (22 U. S. C. 211a) and which make travel without a passport illegal (50 U. S. C. 1185); and are not in conflict with section 6 of the Internal Security Act of 1950 (Opinion, pp. 16,17).

(2) Judge Washington, in a separate opinion, concurring only in the result, declined to decide whether past or present membership in the Communist Party in itself would be sufficient ground to support denial of a passport, or "such questions as whether the Secretary's regulations are in every particular valid, whether he is justified in using confidential information, whether he must always

hold a hearing, and the like" (Opinion, p. 34). He addressed himself exclusively to the affidavit requirement which, he said, "does infringe Dr. Briehl's interest in maintaining privacy and upon interests protected by the First Amendment" (*id.* at p. 31). However, he justified that requirement on the ground that it "might prove relevant to a valid denial of a passport" (*ibid.*).

(3) Judge Bazelon's dissenting opinion, Chief Judge Edgerton concurring, concluded:

> "(1) the President has not delegated to the Secretary of State the power to decide which Americans may travel and which may not; (2) neither of the two statutes relied on by the Secretary as a source of such power—22 U. S. C. § 211a and 8 U. S. C. § 1185—grants the power, in terms, either to the President or to the Secretary; (3) a construction of either or both of the statutes as granting the power would conflict with other expressions of congressional policy and would raise constitutional doubts of the utmost gravity, especially to the extent that eligibility is made to depend upon matters of political beliefs and associations; (4) since the power was not conferred by statute, the President does not possess it, for it is not one of the powers inherent in his office" (Opinion, p. 69).

(4) The Chief Judge wrote a separate dissenting opinion, agreeing with Judge Bazelon that "the President and Congress have not undertaken to delegate to the Secretary the authority he claims" and that if he had done so "serious constitutional questions would arise". He declared that "the Secretary should be directed to issue a passport" (Opinion, pp. 70-71).

(5) Judge Fahy also dissented, in a separate opinion. Relying upon the earlier decision of the same court sitting

en banc, in *Boudin* v. *Dulles*, 98 U. S. App. D. C. 205, 235 F. 2d 532 (1956), he concluded that the Secretary should be required to reconsider the case and render a decision upon findings of fact. While Communist Party membership might be relevant to the right to travel, he stated, "It does not follow * * * that refusal by the applicant to furnish this relevant information, without more, brings denial of his application into conformity with due process" (Opinion, p. 74). He distinguished *Garner* v. *Los Angeles Board*, 341 U. S. 716 (1951), on the ground that the affidavit there "was required by law and was with respect to retaining State employment". "Furthermore, the failure of appellant to furnish the information may have been in good faith reliance upon the First Amendment, *cf. Konigsberg* v. *State Bar of California*, 353 U. S. 252, or for other good faith reasons * * *" (Opinion, pp. 74, 76).

Reasons for Granting the Writ

The Court below, in these cases, has decided important questions of federal law which have not been, but should be, settled by this Court; and it has, in some respects, decided those questions in a way which conflicts with applicable decisions of this Court.[3]

The questions decided here stem from the Secretary of State's imposition of political conditions on the issuance of passports to American citizens. Early authoritative adjudication of those questions by this Court is vital to the proper administration of the passport laws and to a definition of the citizen's constitutional rights in the field of

[3] Furthermore, as will appear, *infra*, p. 26, the opinion of four of the Circuit judges that "a passport denial may be based upon confidential information." (Opinion, p. 27) conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9, 1955).

foreign travel. The Secretary himself has recognized the urgency of a ruling by this Court.[4]

The questions presented are of recent vintage. Until the last decade, the Government imposed no general restrictions on the right to travel abroad by reason of a citizen's political views or associations. Soon after the close of World War II, however, the Secretary of State began sporadically to apply the formula, "contrary to the best interests of the United States," as a ground for revoking or denying passports. "*Passport Denied*": *State Department Practice and Due Process*, Note, 3 Stanford Law Review 312 (1951); *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review; Comment*, 61 Yale Law Journal 171 (1952).[5] Following criticism of his

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[4] In his news conference of May 14, 1957, Secretary of State Dulles said (The New York Times, May 15, 1957, p. 10):

"* * * Of course, the whole legal area as regards passports is somewhat in doubt, and there are pending a number of cases in the courts which, if they go up to the Supreme Court, will probably lead to some authoritative decision as to just what the functions and responsibilities of the Secretary of State are as regards passports. And whether or not it will be held that there is a right to travel everywhere which is superior to foreign policy, I don't know. If the courts so decide, naturally, I will accept such a decision. But as long as it is the practice, and so far as it is consonant with judicial opinions, to hold that the issuance of a passport involves foreign policy considerations—so long as that is the case, I will have to exercise my authority in accordance with what I judge to be the interests of the United States.

"Q. Would you like to see a court test made of that, sir? A. Yes. * * *"

[5] The Secretary initially denied passport facilities under this formula, *inter alia*, to such noted citizens as Dr. Linus Pauling, the world-renowned chemist; Judge William Clark, formerly of the Third Circuit Court of Appeals; Dr. Martin Kamen, now professor of biochemistry at Brandeis University; and Dr. Otto Nathan, professor of economics at New York University and executor of the

passport procedures by the statutory court in *Bauer* v. *Acheson*, 106 F. Supp. 445 (1952), the Secretary promulgated the regulations of August 28, 1952, here in issue, which, for the first time in American history, established political standards for travel abroad during peacetime.

These Passport Regulations, which have adversely affected the lives of thousands of American citizens, have led to widespread scholarly and editorial criticism.[6] In less than five years, they have inspired a score of lawsuits in the

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estate of Albert Einstein. Confronted with the threat of court orders directing quasi-judicial hearings, or adverse publicity, the Secretary later issued passports to those citizens. See Pauling, *My Efforts to Obtain a Passport*, 8 Bulletin of Atomic Scientists 253 (1952); Sen. Comm. on Judiciary, Subc. on Constit. Rts., Hrgs., Nov. 15-16, 1955, 84th Cong., 1st Sess., pp. 200 ff., 271-284, 364-368, 375, 377-378; *Clark* v. *Dulles*, 129 F. Supp. 950 (D. C. D. C., 1955); *Dulles* v. *Nathan*, 96 U. S. App. D. C. 190, 225 F. 2d 29 (1955).

[6] See, for example: Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 Virginia L. R. 853 (1954); Barnett, *Passport Administration and the Courts*, 32 Oregon L. R. 193 (1953); Wyzanski, *Freedom to Travel*, Atlantic Monthly, October, 1952; Doman, *A Comparative Analysis: Do Citizens Have the Right to Travel*, 43 A. B. A. J. 307 (1957); Editorials: Chicago Daily Sun Times, November 26, 1955; New York Times, May 4, 1956; Denver Post, May 27, 1956.

Perhaps the most eminent critic of these passport policies is the former Secretary of State who himself promulgated the regulations of 1952; he characterizes them as "a grave mistake and a failure to foresee consequences which were inevitable." Acheson, *A Democrat Looks at His Party* (1955), p. 127.

The increasing concern of distinguished commentators is exemplified by such writings as O'Brian, *National Security and Individual Freedom* (1955), pp. 39, 48; Chafee, *Three Human Rights in the Constitution* (1956), pp. 162-214; Gellhorn, *Individual Freedom and Governmental Restraints* (1956), p. 15; Cushman, *Civil Liberties in the United States* (1956), pp. 113-116.

District Court for the District of Columbia [7] and have led to six major decisions, other than those in the instant cases, in the court below: *Dulles* v. *Nathan*, 96 U. S. App. D. C. 190, 225 F. 2d 29 (1955); *Schachtman* v. *Dulles*, 96 U. S. App. D. C. 287, 225 F. 2d 938 (1955); *Boudin* v. *Dulles*, 98 U. S. App. D. C. 305, 235 F. 2d 532 (*en banc*, 1956); *Dayton* v. *Dulles*, 99 U. S. App. D. C. 47, 237 F. 2d 43 (1956); *Kraus* v. *Dulles*, 98 U. S. App. D. C. 343, 235 F. 2d 840 (1956); *Stewart* v. *Dulles*, C. A. D. C. Nos. 13533, 13622, 13638 (*en banc*, July 3, 1957).

The marked divergence of the views expressed in these several cases by the judges of the Court of Appeals sitting *en banc* emphasizes the pressing need for review by this Court, which has never had occasion to consider the important questions involved.[8] The magnitude of the problem is indicated further by the large numbers of citizens affected: More than a million Americans annually use passports for travel abroad;[9] and over half a million passports are issued each year [10] upon application forms which since 1956 require every applicant to state whether he is or ever

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[7] Among cases still pending in the District Court are *Duberg* v. *Dulles*, C. A. No. 2959-56; *Leff* v. *Dulles*, C. A. No. 2958-56; *Chodorov* v. *Dulles*, C. A. No. 1733-56; *Lamont* v. *Dulles*, C. A. No. 1463-57.

[8] Only once in its entire history has this Court had occasion to determine whether a litigant was entitled to a passport. *Perkins* v. *Elg*, 307 U. S. 325 (1939). That case involved the single issue, whether the petitioner was a citizen; it did not involve the validity of the regulations here, which were promulgated many years later, or the constitutional problems here presented.

This Court denied certiorari in *Robeson* v. *Dulles*, 98 U. S. App. D. C. 313, 235 F. 2d 810 (1956), cert. den. 352 U. S. 895 (1956), where the petitioner, unlike those herein, had not pursued the administrative remedy. See Washington, J., Opinion, p. 29.

[9] Statistical Abstract of the United States, 1956, pp. 100-101.

[10] Hearings before Subcommittee of Committee on Appropriations, U. S. Senate, 85th Congress 1st sess. H. R. 6871, p. 557.

was a member of the Communist Party—the most widespread loyalty test imposed in our history upon American citizens desiring to exercise a constitutional right.

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1. Initially there is presented the important question whether, in promulgating and enforcing the Passport Regulations, the Secretary of State has exceeded his statutory authority and has acted in conflict with the Congressional intent expressed in pertinent legislation. Only four of the judges below were of the opinion that the Secretary was acting completely within his authority; two of the judges thought his regulations were totally invalid; of the remaining judges, one believed that the regulations were in part invalid, and the other found it unnecessary to pass upon their validity.

Rule 19(b) of the Rules of this Court provides that conflicts between Courts of Appeals are a consideration in determining whether a writ shall be granted. Since all passport cases necessarily arise in the Court of Appeals for the District of Columbia Circuit, such a conflict can never be present in cases of this sort. Certainly, however, the sharp differences of opinion appearing among the eight Judges of the Circuit who heard the instant case, present a situation analogous to a conflict between Circuits.

In addition to the five opinions written in this case, three were written in *Stewart* v. *Dulles*, *supra*, which also presents issues arising out of the Passport Regulations. And, finally, the conflict in the District Court for the District of Columbia is so great that it may almost be said that each Judge has his own formula for handling problems arising under the Regulations. Cases *supra*, p. 13.

2. The Passport Regulations explicitly purport to be based upon a single statute, 22 U. S. C. 211a. That statute, enacted at a time when the right to travel was not depend-

ent upon a passport, only centralizes the function of passport issuance in the Secretary;[11] it does not authorize the establishment of a classification system of travellers and non-travellers. For nearly a century since the enactment of the statute in 1856 (11 Stat. 60) both the President and the Secretary apparently deemed their authority in passport issuance to be thus limited. During that period the Secretary never presumed to establish substantive conditions to the issuance of passports or to the exercise of the right to travel; and the President never claimed the right to establish such conditions directly or by delegation through the Secretary. Acting under the statute, both President and Secretary merely prescribed the nature of the proof of citizenship—the prime condition established by Congress for passport issuance—and the mechanics of administration (Opinion, pp. 38-39).

The majority below find authority in the Secretary to establish the substantive conditions he has opposed, not in the Act of 1856, but in the provisions of another statute, 8 U. S. C. 1185. The Passport Regulations, which expressly cite 22 U. S. C. 211a, omit any reference to 8 U. S. C. 1185. And with good reason. For, as Judge Bazelon points out, this latter statute merely granted the President, in a national emergency, discretion to determine for which parts of the world passports were required, "not to determine which Americans are to receive passports" (Opinion, p. 40).

Moreover, the Passport Regulations conflict with the Congressional intention expressed in pertinent legislation.

(a) In 1856, Congress established its first criterion for passport issuance, that of citizenship; and, until 1950, that remained the sole condition to issuance of a passport.[12]

[11] Dept. of State, The American Passport (1898), *passim*.

[12] Except insofar as it was expanded in 1902, to include "other proof * * * owing allegiance, whether citizens or not * * *." A variant to this occurred during the Civil War, when non-citizens who had borne arms for the Union were entitled to passports. 32 Stat. 386.

In 1950, Congress enacted section 6 of the Internal Security Act, 50 U. S. C. 785, denying passports to present members of organizations required by a final order of the Subversive Activities Control Board to register as Communist organizations. In contradistinction, the Passport Regulations deny passports to "persons who support the world Communist movement". Such support is determined by an assessment of the citizen's entire life. While the standards of the regulations are amorphous and based upon *past* activities, the restriction in the Internal Security Act is precise and refers to persons who *remain* members of an organization which is the subject of a final order of the Board.

This inconsistency between regulation and statute is admitted *sub silentio* by the Secretary's claim that the Passport Regulations enforce "the spirit of the law".[13] But the Department is subject to the specific terms of the laws and standards established by Congress, including the procedures and timetable for putting them into operation. Its anticipation of them and enlargement upon them, however motivated, is inconsistent with the legislative will and hence invalid. *United States* v. *Symonds*, 120 U. S. 46, 49-50 (1887); see also *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129 (1936); *Miller* v. *United States*, 294 U. S. 435 (1935); *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599 (1930); *Merritt* v. *Welsh*, 104 U. S. 694 (1882).

(b) Secondly, as Judge Bazelon concludes (Opinion, pp. 42-43), the Regulations, in permitting the Secretary to say who among our citizens may leave and who may not leave,

[13] See testimony of Mr. Scott McLeod, Administrator of the Bureau of Security and Consular Affairs, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, p. 192.

negate the "right of expatriation" declared as a policy by Congress in 1868 and never repealed. 15 Stat. 223-224, R. S. 1999, 8 U. S. C. 800 (1940 ed.); see *Savorgnan* v. *United States*, 338 U. S. 491, 498, n. 11 (1950). For expatriation today is impossible without leaving the country. 8 U. S. C. 1481, 1483.

3. The broad construction of 22 U. S. C. 211a and 8 U. S. C. 1185 which the court below sanctions raises serious constitutional problems. This consideration, in itself, would support the narrower construction of the statutes which the dissenting judges have adopted. *United States* v. *Rumely*, 345 U. S. 41, 46 (1953); *United States* v. *Witkovitch*, 353 U. S. 194 (1957).

No statute supplies any standards for the Secretary's classifications of citizens who may travel abroad and of those who may not; it is doubtful if Congress could delegate such powers of classification, essentially a law-making power, to the Executive Branch. *Wayman* v. *Southard*, 10 Wheat. (23 U. S.) 1, 43 (1825). Certainly it could not do so without providing standards, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398 (1940); *United States* v. *Rock Royal Cooperative*, 307 U. S. 533, 576 (1939). And such standards, totally lacking here, would have to be precise since they deal with "an attribute of personal liberty". *Williams* v. *Fears*, 179 U. S. 270, 274 (1900). *Saia* v. *New York*, 334 U. S. 558, 560 (1948); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Niemotko* v. *Maryland*, 340 U. S. 268, 271 (1951); *Burstyn* v. *Wilson*, 343 U. S. 495 (1952).

The absence of Congressional delegation is not cured by resort to the so-called inherent powers of the President in foreign affairs and national security (see Judge Prettyman's opinion, pp. 9, 10, 22). Neither of those extraordinary Presidential powers warrants the limitations which

are imposed on the citizen's right to travel. The limited nature of such powers and of the history of their exercise is set forth in Judge Bazelon's dissent (Opinion, pp. 54-68). Attempted extension of such powers to sanction Executive transgression of private rights in matters of internal affairs has only recently been struck down by this Court, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 632, 644 (1952).

4. The Secretary of State has denied passports to petitioners because they failed to meet his political standards (B.R. 65-68, K.R. 76-84). The judgments of the Court below sustain the Secretary's denial on that ground. Thus, this case presents for decision those "far-reaching and complex questions relating to freedom of speech, press and assembly" which this Court found it unnecessary to reach in *Konigsberg* v. *State Bar of California*, *supra*.

All of the judges of the Court of Appeals agree that these regulations abridge First Amendment rights (Opinion, pp. 22, 31, 44, 70, 74). Such abridgments are *prima facie* invalid and "ordinarily irrelevant to permissible subjects of governmental action". *American Communications Association* v. *Douds*, 339 U. S. 382, 391 (1950); *Bridges* v. *Wixon*, 326 U. S. 135 (1945). Four of the judges, however, deem such abridgments clearly warranted by considerations of national security. But neither they, nor the Secretary, have sustained the burden of justifying those abridgments either under the "clear and present danger test" (*Thomas* v. *Collins*, 323 U. S. 516, 530); under the *Dennis* test: "that the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" *United States* v. *Dennis*, 183 F. 2d 201, 212 (1950); adopted in *Dennis* v. *United States*, 341 U. S. 494, 510 (1951); or under any other test.

Judge Prettyman's argument that "the Communist movement today is an international conspiracy" (Opinion, p. 6) fails to indicate how the travel of Americans will so aid that evil that First Amendment rights must be overruled. He makes two suggestions, (1) that such travel will permit "communication" between "adherents to the Communist movement" (Opinion, p. 21) and, (2) that, if abroad, they might arouse hostile activities by the Soviet Union which would require the United States to protect them (*id.*, pp. 21-22).

Since adequate means of communication exist without travel, however, the real question is whether it is reasonable to place this large net over the hundreds of thousands of Americans who have joined organizations on our multifarious "subversive" lists (see Morison, *Freedom in Contemporary Society* (1956), pp. 35-42). Moreover, if the Government may bar communication for reasons of national security, it would be equally proper to prohibit the use of the mails, cables and telephone to such persons (see Judge Bazelon's dissent, Opinion, p. 48). Each such restriction upon communication raises the same problems of reconciliation with the First Amendment.

The fear of international involvement consequent on travel of Communist sympathizers is speculative to the point of unreality. Further, our Government is not required to protect American citizens who behave improperly and, historically, it has refused to do so. See, *e. g.*, Borchard, *Diplomatic Protection of American Citizens Abroad*, (1915), p. 356; *U. S. ex rel. Keefe v. Dulles*, 94 U. S. App. D. C. 381, 384-85, 222 F. 2d 390, 393-94 (1954), cert. den. 348 U. S. 952 (1955).

The Passport Regulations are not based upon the two considerations advanced by Judge Prettyman, but upon

those which have induced political repression in all areas during the last decade: the desire to create political conformity and to punish political dissenters. The distinguished character of the citizens denied passports and the activities ascribed to them by the Secretary, amply support this conclusion (*supra*, notes 4, 6). This Court has recently expressed its concern over the effects of this policy of repression. *Sweezy* v. *New Hampshire*, 354 U. S. 234, 248, 262-264 (1957); *Watkins* v. *United States*, 354 U. S. 178, 197. See also Learned Hand, *The Spirit of Liberty* (1952), p. 257; O'Brian, *supra*, note 6, *passim*.

The common denominator of the classes proscribed by § 51.135 of the regulations is lawful activity, political in character, disapproved of by the Secretary. The regulations in practice are invariably predicated upon § 51.135 (b)—activities deemed to support the Communist movement. None of the litigated cases, including the present ones, involves a charge of present or recent membership under § 51.135(a). Indeed, the Secretary is indifferent to a denial of recent activity. *Stewart* v. *Dulles*, *supra*. In none does the Secretary claim that the sworn statement of the purpose of travel is untrue or that travel for that purpose is proscribed by the Regulations.

Hence, the Secretary has sought to prevent an American lawyer from representing clients abroad before quasi-judicial tribunals, *Boudin* v. *Dulles*, *supra*; the executor of an estate from settling its affairs, *Dulles* v. *Nathan*, *supra*; a scientist from attending professional conventions, *Kamen* v. *Dulles*, *infra*, No. 617; and a playwright from writing movie scripts on location in Spain, *Stewart* v. *Dulles*, *supra*. In each of the score of litigated cases, the Secretary has decided that the applicant's past political associations may make him unfit for travel.

The disqualifications in the present cases are on the basis of such constitutionally protected activities as petitioning the government, seeking repeal of the Walter-McCarran Act, asserting one's constitutional privilege before a Congressional committee, holding or expressing views on public issues and connections with organizations on the Attorney General's list or that of the House Un-American Activities Committee (B.R. 13-14, 22-23; and K.R. 24-26).

Insofar as the Passport Regulations posit ineligibility for travel on past conduct antedating their promulgation, they also constitute a bill of attainder and retroactive penal legislation, in violation of Article I, section 9 of the Constitution. See *Ex parte Garland*, 71 U. S. 333 (1867); *Cummings* v. *Missouri*, 71 U. S. 277 (1867). Likewise objectionable as a bill of attainder is § 51.142 of the regulations, which provides that "If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings."

5. The requirement that the passport applicant proceed to disprove, by sworn statement, the allegations made by the Secretary of State and execute an affidavit as to past and present membership in the Communist Party raises additional constitutional problems.

It is an ingenious device to avoid the determination of constitutional issues and to require a litigant to surrender some constitutional rights as a precondition to the determination of others. It would shift the burden of proof imposed by the courts below in *Dulles* v. *Nathan*, *supra*, from the Secretary to the applicant and dispense with the quasi-judicial hearing to which passport applicants are entitled under the passport decisions of the court below, see cases, *supra*, p. 13, and the decisions of this and other

courts, *Ex parte Garland, supra; Cummings* v. *Missouri, supra; Goodyear Synthetic Rubber Corp.* v. *Department of Industrial Relations,* — Ohio —, 122 N. E. 2d 503 (1954); *Philadelphia Co.* v. *Securities and Exchange Commission,* 84 App. D. C. 73, 175 F. 2d 808 (1948).

The courts have repeatedly struck down attempts to compel disclosure of political assertions as a precondition to the assertion of rights. *Rudder* v. *United States,* 96 App. D. C. 329, 226 F. 2d 51 (1955); *Kutcher* v. *Housing Authority of Newark,* 20 N. J. 181, 119 A. 2d 1 (1955); *Lawson* v. *Housing Authority of Milwaukee,* 270 Wis. 269, 70 N. W. 2d 605 (1955), cert. den. 350 U. S. 882 (1955); *Housing Authority of the City of Los Angeles* v. *Cordova,* 130 Cal. App. 2d Supp. 883 (1955), cert. den. 350 U. S. 969 (1956); *Chicago Housing Authority* v. *Clark,* 4 Ill. 2d 319, 122 N. E. 2d 522 (1954).

The authority to compel such disclosure has never been implied, *United States* v. *Minker,* 350 U. S. 179 (1956); *United States* v. *Witkovich, supra*; has always required explicit statutory support, see *Garner* v. *Board of Public Works,* 341 U. S. 716 (1951); *Gerende* v. *Board of Supervisors,* 341 U. S. 56 (1951); *American Communications Association* v. *Douds, supra,* and has invariably been limited to government employment or discretionary use of governmental facilities. *Ibid.*

In equating the demand for proof of political probity with an application for a license, the majority below overlooked the fact that travel is a constitutional right, not subject to licensing in the ordinary sense. See *Lovell* v. *Griffin, supra,* at 451; Judge Bazelon's dissent (Opinion, p. 45). Further, unlike an application for a license, those who, like Drs. Linus Pauling and Otto Nathan, have executed such oaths for the Passport Office have found them disre-

garded.[14] Conversely, the Secretary "may waive these Regulations on an *ad hoc* basis, if he desires to do so."[15]

6. The court below has repeatedly held that the right to travel abroad is protected by the due process clause of the Fifth Amendment. *Dulles* v. *Nathan, supra; Schachtman* v. *Dulles, supra; Boudin* v. *Dulles, supra; Dayton* v. *Dulles, supra; Kraus* v. *Dulles, supra.* While these decisions are consistent with this Court's rulings upholding the right of American citizens to travel within the United States, *Edwards* v. *California*, 314 U. S. 160, 180-181 (1941); *Crandall* v. *Nevada*, 73 U. S. 35, 44 (1867); *United States* v. *Wheeler*, 254 U. S. 281, 293 (1920); *Williams* v. *Fears, supra*, the issue as to foreign travel has never been presented to this Court.

The Passport Regulations, as written and applied to petitioners, pose important issues as to substantive due process in their indifference to the purpose of the travel, their reliance upon associations with organizations on the "subversive lists" of the Attorney General and the House Committee on Un-American Activities, the absence of *scienter*, and their vagueness.

(a) Petitioners' travel for professional reasons, in one case to attend a convention on mental health and in the other to paint pictures, is obstructed on the ground of their past political associations. Assuming, *arguendo*, the existence of power in the Secretary to restrain the movements of citizens through passport control or otherwise, such restraints are arbitrary and unreasonable unless related to the purpose of the travel, rather than to the

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[14] Sen. Comm. on Judiciary, Subc. on Constit. Rights, 84th Cong., 2d sess. (1955), pp. 103-140.

[15] *Id.*, p. 198.

political heterodoxy, of the citizen. The absurdity of the standards is epitomized by the statement that "the Department is not willing to grant you [Mr. Kent] passport facilities for travel to any countries for any purpose" (K.R. 10). This absence of rational basis for discrimination among citizens causes a violation of due process under *Nebbia* v. *New York*, 291 U. S. 502 (1934), and *Konigsberg* v. *State Bar of California*, *supra*.

(b) The reliance upon the citizen applicant's connection with organizations on the "subversive lists" conflicts with this Court's conclusions with respect to such lists expressed in *Barsky* v. *Board of Regents*, 347 U. S. 442 (1954) and *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951); and with the views of the appellate courts in *Schachtman* v. *Dulles*, *supra*; and *United States* v. *Remington*, 191 F. 2d 246 (2d Cir. 1951), *cert. den.*, 343 U. S. 907 (1952).

(c) The Secretary's indifference to the individual's state of mind, indeed to his personal activities, is amply demonstrated by his failure to challenge the contents of, indeed even to read, the article written by Dr. Briehl (B.R. 39-40, B.R. 52-58). Such indifference to *scienter* violates this Court's strictures in *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Schware* v. *Board of Examiners*, 353 U. S. 232, 246 (1957), and *Konigsberg* v. *State Bar of California*, *supra*.

(d) The vagueness of the regulations is manifest from a mere reading of them. They refer to "adherence to the Communist Party line" and to "the Communist movement" and to persons acting "in furtherance of the interests and under the discipline of the Communist Party" (§ 51.135). Such vagueness is compounded by the use of such terms as "under such circumstances as to warrant the conclusion" or "on the balance of all the evidence",

since no evidence is revealed to the applicant and he must testify completely in the dark and "confirm his oral statements in an affidavit for the record" (§ 51.137).

These standards violate "the first essential of due process of law". *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926); *Small* v. *American Sugar Refining Co.*, 267 U. S. 233, 238-240 (1925); see *United States* v. *Hautau*, 43 F. Supp. 507 (D. N. J., 1942). This Court will be particularly critical of vagueness where, as here, First Amendment rights are involved; *Burstyn* v. *Wilson*, *supra*; *Winters* v. *New York*, 333 U. S. 507 (1948); *Niemotko* v. *Maryland*, *supra*; *Kunz* v. *New York*, 340 U. S. 290 (1951). Even the more precise term, Communist Party membership, raises serious problems of definition and proof, *Jencks* v. *United States*, 353 U. S. 657, 678 (1957) (Burton, J., concurring). The far more imprecise language of the Passport Regulations and the possibility of criminal sanctions amply justifies review of these cases.

6. The Passport Regulations also raise substantial questions of procedural due process. Two years ago, the court below declared that, notwithstanding the Secretary's regulations, passport applicants were entitled to a quasi-judicial hearing. *Dulles* v. *Nathan*, *supra*. It has since repeated this injunction on five separate occasions. Cases *supra*, p. 13. Notwithstanding, the Secretary has continued his regulations unchanged except for periodic reports of "studies" being made by the Department.

The "hearings" afforded under the regulations are still based upon unsworn broad "allegations" which the Secretary recites without adopting. His agents produce no evidence against the applicant but choose instead to examine him under oath as to his political associations and

opinions. The decision of the Passport Office is based upon secret reports which, in turn, are based upon secret informants, of whose names and veracity the Department often has no knowledge,[16] and "after consultation with other interested officers" (§ 51.137) whose advice is not disclosed to the applicant. The proceedings before the Board of Passport Appeals of the Department are a repetition of those before the Passport Office (§§ 51.151-51.170); and the Board's report to the Secretary is never revealed to the applicant.

These procedures clearly do not comport with due process as enunciated in decisions of this Court. *Morgan* v. *United States*, 304 U. S. 1, 18 (1938); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292, 302-304 (1937); *Lloyd Sabaudo S.A.* v. *Elting*, 287 U. S. 329, 335-336 (1932); *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, 288-289 (1924). These decisions, which involve property rights, must be liberally applied to cases involving the personal liberty of movement.

Moreover, the approval of four of the judges below of the Secretary's resort to confidential information disclosed neither to the applicant nor to the courts (Opinion, p. 27), is plainly in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Parker* v. *Lester*, *supra*, which set aside as unconstitutional Coast Guard regulations concerning the issuance of validated merchant mariner's documents, which, for seamen, are tantamount to passports (22 C. F. R. § 53.2(c)).

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[16] See the stipulation in *Kamen* v. *Dulles*, D. D. C., C. A. No. 1121-55 dated June 6, 1955, which appears in Hearings, Sen. Comm. on Judiciary, Subc. on Constit. Rights, *supra*, pp. 92-93. And see paragraph 4 of the affidavit of John Foster Dulles, dated January 11, 1956, in *Boudin* v. *Dulles*, *supra*.

In view of this Court's disposition to review the fairness of hearings involving the "privilege of Government employment", *Bailey* v. *Richardson*, 341 U. S. 918 (1951); *Peters* v. *Hobby*, 349 U. S. 331 (1954), it will be even more concerned with procedural due process affecting the constitutional right to travel.

8. The Secretary's indifference to the lower court's repeated directions to afford quasi-judicial hearings and other elements of due process violated by the Passport Regulations is inconsistent and incompatible with the rule of law which should govern all branches of the Government. It puts a premium on litigation because only then will the citizen receive the protection to which he is entitled. Clearly the authoritative voice of this Court is necessary to insure due process for non-litigants.

CONCLUSION

For the first time in American history, American citizens are being denied the right to travel by reason of lawful political associations, beliefs and expressions. For the first time, a Secretary of State has imposed substantive conditions upon the right to travel, conditions inconsistent in letter and in spirit with those established by Congress.

These cases present unusual, complex and far-reaching problems of a statutory, constitutional and practical nature which have never been considered by this Court. We are immediately concerned with a physician and an artist who desire to travel abroad in the interests of their respective professions. But the Passport Regulations affect not only these two citizens and the 700,000 annual passport applicants, who must pass the first political test ever extended to citizens who desire no government bounty

or privilege, but all American citizens who are warned that their exercise of First Amendment rights may prevent them from ever going abroad for purposes of vacation, business, or education. Cf. the Chief Justice's remarks in *Watkins* v. *United States*, *supra*, at pages 197-8.

The justification advanced for this drastic interference with a right traditionally free from control by the government is a familiar one in these times. But, as Judge Bazelon said, "The word Communist is not an incantation subverting at a stroke our Constitution and all our cherished liberties" (Opinion, p. 46).

For a decade, this nation has been subjected to the undemocratic passport policies of the State Department. These policies, irrational when promulgated, are becoming more irrational every day as the need for international communication and cooperation increases. The policies, originally directed against alleged subversives, as with all such arrogations of power, were extended by the Secretary—first, to prevent travel by a distinguished critic of our foreign policy, *Clark* v. *Dulles*, *supra*, and then to prevent newspapermen from reporting what is happening abroad. As Chief Judge Edgerton cautioned below (Opinion, p. 70): "We have temporized too long with the passport practices of the State Department. Iron curtains have no place in a free world"

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

September 13, 1957.

Respectfully submitted,

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APPENDIX A

1. The pertinent sections of Title 22 of the United States Code are as follows:

§ 211a. *Authority to grant, issue, and verify passports.*—The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls, when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

§ 212. *Who entitled to passport.*—No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.

2. Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. 1185, as codified, is as follows in pertinent part:

§ 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) [There follow restrictions enumerated (1) through (7) not here pertinent.]

* * *

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

3. Title I, § 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U. S. C. 785, as codified, is as follows:

(a) When a Communist organization as defined in paragraph (5) of section 3 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

(c) As used in this section, the term "member" shall not include any individual whose name has not been made public because of the prohibition contained in section 9 (b) of this title.

4. The Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999 is as follows:

Right of expatriation

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of the Republic.

5. The pertinent portions of the Regulations of the Secretary of State, as found in Title 22 of the Code of Federal Regulations, are as follows:

(a) Part 51 of Title 22, 1955 Supplement:

§ 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*—In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence

—that they continue to act in furtherance of the interests and under the discipline of the Community [sic] party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement."

§ 51.136.[19] *Limitations on Issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary

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[19] The provisions of Section 51.136 are here set forth as amended by the Secretary of State, 21 F. R. 336, January 18, 1956. These amendments have not yet been reflected in the Supplement to the Code of Federal Regulations. Prior to that date § 51.136 read as follows:

"§ 51.136 *Limitations on Issuance of Passports to Persons Likely to Violate Laws of the United States.* In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States."

of State that the person's activities abroad would: (1) violate the laws of the United States; (2) be prejudicial to the orderly conduct of foreign relations; or (3) otherwise be prejudicial to the interests of the United States.

§ 51.137. *Notification to persons whose passport application is tentatively disapproved.*—A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit. Such advice shall also inform the applicant of his right to appeal under § 51.138.

§ 51.138. *Appeal by passport applicant.*—In the event of a decisitor adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139.

§ 51.139. *Creation and functions of Board of Passport Appeals.*—There is hereby established within the Department of State a Board of Passport Appeals, hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.138.

The Board shall adopt and make public its own rules of procedure, to be approved by the Secretary, which shall provide that its duties in any case may be performed by a panel of not less than three members acting by majority determination. The rules shall accord applicant the right to a hearing and to be represented by counsel, and shall accord applicant and each witness the right to inspect the transcript of his own testimony.

§ 51.140. *Duty of Board to advise Secretary of State on action for disposition of appealed cases.*—It shall be the duty of the Board, on all the evidence, to advise the Secretary of the action it finds necessary and proper to the disposition of cases appealed to it, and to this end the Board may first call for clarification of the record, further investigation, or other action consistent with its duties.

§ 51.141. *Bases for findings of fact by Board.*—(a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135(b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*—At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.[20] *Applicability of Sections 51.137-51.142.* Except for action taken by reason of noncitizenship or geographical limitations of general applicability necessitated by foreign policy considerations, the provisions of §§ 51.137-51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing or in any other fashion or degree affecting the ability of such person to receive or use a passport.

RULES OF THE BOARD OF PASSPORT APPEALS

§ 51.151. *Organization of Board.*—The Secretary of State shall appoint a Board of Passport Appeals consisting of three or more members, one of whom shall be designated by the Secretary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152. *Decisions of the Board.*—Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.140, which shall be in closed

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[20] The provisions of Section 51.143 are here set forth as amended by the Secretary of State, 21 F. R. 336, January 18, 1956. These amendments have not yet been reflected in the Supplement to the Code of Federal Regulations. Prior to that date, § 51.143 read as follows:

"§ 51.143 *Applicability of Sections 51.135-51.142.* When the standards set out in § 51.135 or § 51.136 are made relevant by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137-51.142 shall be followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case."

session. Decisions under § 51.140 shall be in writing and shall be signed by all participating members of the Board.

§ 51.153. *Counsel to the Board.*—A Counsel, to be designated by the Secretary of State, shall be responsible to the Board for the scheduling and presentation of cases, aid in legal and procedural matters, information to the applicant as to his procedural rights before the Board, maintenance of records and such other duties as the Board or the Chairman, on its behalf, may determine.

§ 51.154. *Examiner.*—The Board may, within its discretion, appoint an examiner in any case, who may, with respect to such case, be vested with any or all authority vested in the Board or its presiding officer, subject to review and final decision by the Board, but, an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155. *Chairman.*—The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.156. *Prior administrative remedies.*—It is required that prior to petitioning for an appeal, an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

§ 51.157 *Petition.*—An applicant desiring to take an appeal shall, within thirty calendar days after receipt of the advice of adverse decision by the Passport Office file with the Board a written petition under oath or affirmation which shall, in plain and concise language, refute or explain the reasons stated by the Passport Office for its decision.

§ 51.158 *Delivery of papers.*—Petitions or other papers for the attention of the Board may be delivered personally, by registered mail, or by leaving a copy at the offices of the Board at the address to be stated in the advice of adverse action furnished applicant by the Passport Office.

§ 51.159 *Notice of hearing.*—Applicant shall receive not less than five calendar days notice in writing of the scheduled date and place of hearing which shall be set for a time as soon as possible after receipt by the Board of applicant's petition.

§ 51.160 *Appearance.*—Any party to any proceedings before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§ 51.161 *Applicant's attorney.*—(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties appear as attorney in behalf of an applicant in any case of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of the applicant's activities relevant to a determination of that case.

§ 51.162 *Supplementary information to applicant.*—The purpose of the hearing is to permit applicant to present all information relevant and material to the decision in his case. Applicant may, at the time of filing his petition, address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case. In conformity with the relevant

laws and regulations, the Board shall pass promptly and finally upon all such requests and shall advise applicant of its decision. The Board shall take whatever action it deems necessary to insure the applicant of a full and fair consideration of his case.

§ 51.163 *Hearings.*—The Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility. Such files may not be examined by the applicant, except the applicant may examine his application or any paper which he has submitted in connection with his application or appeal. The applicant may appear and testify in his own behalf, be represented by counsel subject to the provisions of § 51.161, present witnesses and offer other evidence in his own behalf. The applicant and all witnesses may be cross-examined by any member of the Board or its counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such depositions may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths or affirmations for the purpose of the depositions. The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

§ 51.164 *Admissibility.*—The Board and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency, and materiality of evidence presented to the Passport Office's stated reasons for its decision and/or to the application of § 51.135 or § 51.136 to applicant's case.

§ 51.165 *Argumentation.*—All argumentation shall be directed to the application of the passport regulations to the facts of the particular case. The Board will permit no oral argument or motions relative to

the legality or propriety of the hearing or other procedures of the Board. Submission of such argument or motions will be confined to the filing of written briefs, objections, or motions to be made a part of the record. The Board will not undertake to consider any such motion or contention.

§ 51.166 *Privacy of hearings.*—Hearings shall be private. There shall be present at the hearing only the members of the Board, Board's Counsel, official stenographers, Departmental employees concerned, the applicant, his counsel, and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony.

§ 51.167 *Misbehavior before Board.*—If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, he may be excluded from participation in any other case before the Board.

§ 51.168. *Transcript of hearings.*—A complete verbatim stenographic transcript shall be made of hearings by qualified reporters, and the transcript shall constitute a permanent part of the record. Upon request, the applicant and each witness shall have the right to inspect the transcript of his own testimony.

§ 51.169. *Notice of decision.*—The Board shall communicate the action recommended under § 51.140 on all cases appealed to it, to the Secretary of State. The decision of the Secretary of State shall be notified in writing to the applicant. Such notice shall be given the applicant as promptly as possible after his hearing before the Board.

§ 51.170. *Probative value of evidence.*—In determining whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not

been advised, specifically or in detail, or to attack the creditability of confidential informants.

(b) Part 53 of Title 22:

§ 53.1. *Limitations upon travel.*—No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his journey, or in the foreign country in which he was last present if such country is not the one from which he started his journey, or unless he comes within one of the exceptions prescribed in §§ 53.2 and 53.3 * * *.

§ 53.2. *Exceptions to regulations in § 53.1.*—No valid passport shall be required of a citizen of the United States or a person who owes allegiance to the United States:

* * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto: *Provided*, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States via any country or territory in North, Central or South America or in any island adjacent thereto, for which a valid passport is required under §§ 53.1-53.9: * * *.

* * *

§ 53.5. *Prevention of departure from or entry into the United States.*—(a) Nothing in this part shall be construed as prohibiting the Secretary of State or his representative at a port in the United States from preventing the departure from or entry into the United States, including the Canal Zone and all territories, continental or insular, subject to the

jurisdiction of the United States, of a citizen of the United States or a person who owes allegiance to the United States unless he bears a passport, card of identification, or other document of identity issued by or under authority of the Secretary of State, notwithstanding the fact that he may be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

(b) Nor shall anything in the regulations in this part be construed as prohibiting the Secretary of State or his representative at a port in the United States from preventing temporarily the departure from or entry into the United States, including the Canal Zone and all territories, continental or insular, subject to the jurisdiction of the United States, of a citizen of the United States or a person who owes allegiance to the United States, notwithstanding the fact that such person may bear a valid passport, card of identification, or other document of identity issued by or under authority of the Secretary of State or be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

* * *

§ 53.8 *Discretional exercise of authority in passport matters.*—Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 13,317

April Term, 1957

C. A. 5042-55

WALTER BRIEHL,

Appellant,

v.

JOHN FOSTER DULLES, Secretary of State,

Appellee.

Filed June 27, 1957.

JOSEPH W. STEWART,
Clerk.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, sitting en banc.

JUDGMENT

This cause came on to be reheard en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment .... of the said District

Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 27, 1957.

PER CURIAM.

Circuit Judges Prettyman, Miller, Washington, Danaher and Bastian vote to affirm.

Chief Judge Edgerton and Circuit Judge Bazelon vote to reverse.

Circuit Judge Fahy votes to remand to the District Court with instructions to remand to the Secretary.

Circuit Judge Burger took no part in the consideration or decision of this case.

Circuit Judge Prettyman filed an opinion in which Circuit Judges Wilbur K. Miller, Danaher and Bastian concur.

Circuit Judge Washington filed an opinion concurring in the result.

Circuit Judge Bazelon filed a dissenting opinion in which Chief Judge Edgerton concurs.

Chief Judge Edgerton also filed a separate dissenting opinion.

Circuit Judge Fahy filed a dissenting opinion.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 13,297

April Term, 1957

C. A. 3441-55

ROCKWELL KENT,

Appellant,

v.

JOHN FOSTER DULLES, Secretary of State,

Appellee.

Filed June 27, 1957.

JOSEPH W. STEWART,
Clerk.

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher and Bastian, Circuit Judges, sitting en banc.

JUDGMENT

This cause came on to be reheard en banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment ... of the said District

Court appealed from in this cause be, and the sam
hereby, affirmed.

Dated: June 27, 1957.

Per Circuit Judge Prettyman

Circuit Judges Prettyman, Miller, Washington, Da
her and Bastian vote to affirm.

Chief Judge Edgerton and Circuit Judge Bazelon vo
to reverse.

Judge Fahy votes to reverse and to remand for furth
proceedings before the Secretary of State consistentl
with the views set forth in his opinion in No. 13,317, *Brie*
v. *Dulles*.

Circuit Judge Burger took no part in the consideratio
or decision of this case.